SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

The salient facts are set forth in the "Statement of the Case" which appears in the Petition for the Writ of Certiorari. It may be necessary to refer to a few additional portions of the testimony during the course of the argument but the substance of the problems presented by the Petition is in this outline and with the Court's permission, the facts will not be repeated here.

POINT ONE.

The Circuit Court of Appeals erred in holding that the plaintiff exceeded the scope or limits of defendant's invitation by being on the freight car for a purpose other than loading at the time of his injury.

a) *The Stipulation.*

As indicated by the statement of facts, Hanson had gotten on the defendant's freight car immediately prior to the acci-

dent for the purpose of placing a plank between the cable, which extended from the crane to the wall of the building, and the top edge of the car. This was a necessary course of conduct to protect the cable and the car. It had been done on previous occasions on the job.

Judge Clark, writing the opinion for the Court, said that the invitation from the defendant to plaintiff's employer and consequently to him to be on the freight car, extended only to the loading of the car. Since the plaintiff was thereon for a purpose other than loading, he thereby transformed himself from an invitee to a licensee. Consequently, the only duty owed to him by the defendant was to abstain from wilful or wanton injury. No proof of wilful or wanton injury being present, the judgment was ordered reversed.

In so holding, the stipulation of the parties relating to the delivery of these freight cars was overlooked entirely. It was to the effect that "the defendant delivered railroad cars including the one referred to in this case to Charles Merberg & Sons, Inc. upon the request of one of its employees." Merberg was Hanson's employer. Whatever rights Hanson had to be on the freight car came to him derivatively through Merberg. Those rights were the same as Merberg's and were measured as were Merberg's for purposes of the trial by the language of the stipulation. It will be observed that under the stipulation the cars were unqualifiedly and unconditionally delivered to Merberg at the site of its demolition operations. As the defendant said in its brief below it "had no control, custody or supervision of the cars after their delivery." There was no restriction by agreement or otherwise on the use to which the cars would be put by Merberg's employees or on the right of Merberg's employees to be on the cars in the course of their regular duties. It might be that a court of law would not sanction some outlandish use of a car or the presence of a Merberg employee on it for some purpose entirely unrelated to the

regular course of his duties, but such is certainly not the situation presented by the proof here.

Custody and control of the car which figured in the plaintiff's accident having been given to his employer under an unconditional delivery, Hanson obviously occupied the status of an invitee while on it, so long as he was there in pursuance of his regular duties. No claim is made by the defendant that at the time of the accident he was engaged in some personal activity having nothing to do with his work. On the contrary, it is conceded, as it must be, that he was furthering his employer's interest when he was hurt. Consequently, his status was that of an invitee of the defendant to whom was owed the duty of reasonable care. It is difficult to see by what reasoning he can be classed as a licensee.

In arriving at the conclusion that the plaintiff had exceeded the bounds of defendant's invitation in being on the car and that he thereby became a licensee, the court seized upon a single answer of the plaintiff which the defendant contended delineated the scope of the invitation. On direct examination the plaintiff was asked the following question:

> "Q. In the course of this operation you had from time to time used the railroad car which was placed on Dudley Street, had you not?"

and he made the answer:

> "A. Yes, sir."

Then he was asked:

> "Q. For what was that car used?"
> "A. Loading scrap iron to be shipped out" (R. 8, 11. 5-9).

On the basis of this last answer, the court adopted the defendant's contention that the use for loading scrap iron

provided the exclusive measure for determining the plaintiff's right to be on the car. This flies in the face of the stipulation of unconditional delivery and permits, in fact forces, the plaintiff by his testimony to affix a limitation upon an agreement relating to the use of the freight car to which he was not a party. He used the car from time to time for loading scrap iron. There is nothing in the record to show that that was the only use for which it was delivered to Merberg & Sons. If it was, the stipulation would have said so. It is fair to assume from the stipulation that the car was delivered for general purposes, for any purpose plaintiff's employer saw fit to use it which was in the ordinary course of its operations.

Invitation to be on premises or property is a legal status which comes about by agreement of the parties either express or implied. It is a bilateral arrangement. The mutual or bilateral arrangement here is expressed by the unqualified language of the stipulation, that is, the defendant delivered its cars to plaintiff's employer at the place of its operations. A unilateral limitation on the use of the cars self-imposed by the invitee without the knowledge of the invitor would not relate back and become a part of the general invitation agreement. In other words, a general invitee in the use of property does not by putting the property to a particular use of his own choosing thereby immediately limit his right to use forevermore to the particular use. Simply because Hanson put the defendant's freight cars to a particular use, the conclusion is not warranted that there was no right to use them, or for Hanson or other Merberg employees to be on them for any other purpose related to the general operation of his or their employer. Consequently, when he boarded the car to protect it and the cable of the crane during the ordinary course of his duties, he was within his rights as an invitee and en-

titled to have reasonable care exercised for his care by the defendant.

b) *Implied Invitation to Hanson.*

Assuming for the purpose of presenting a full argument here that the stipulation relating to the unconditional delivery of the freight car were not in the case and that the sole purpose for which the car was delivered to Hanson's employer's custody was for the loading thereon of scrap or salvaged steel and iron, there would still be a jury question presented as to whether or not Hanson was an invitee on the car by implication. There can be no question but that if he were on the car in connection with his regular work for any purpose reasonably connected with loading, he would be an invitee.

It is not our understanding of the law that when an invitation arises by implication as it does in this case, the precise bounds of the invitation are necessarily to be defined as a matter of law. Assuming for the purposes of argument, that notwithstanding the absence of express restriction of the right of the plaintiff to go upon the car, it can be said that as a matter of law he had no right upon it except for purposes of loading and unloading, there must certainly be included the right to be upon the car for any purpose *reasonably connected with the loading of the car.* The defendant seems to admit that this is so, because in its definition of the invitation to the plaintiff in its brief below, it included an invitation to *move the car for loading.* It is difficult for us to understand why he should have had any greater right to be upon the car for the purpose of moving it preparatory to loading it, than he had to be upon the car for the purpose of assisting in, and superintending an operation, which had to be completed before the material which was to be loaded upon the car would be available. According to the evidence, the tractor and crane were located at the only place suitable

for the operation of tearing down the wall. This, unfortunately, caused the car to interfere with the free use of the cable. There is nothing in the evidence to indicate that the employees of the Merberg company had any right to move the car from the position in which it was supposed to have been secured by the defendant's employees. As a matter of fact, there is ample evidence that during the many months cars had been in use on this job, none had ever been moved by the Merberg employees and it is reasonable to assume that it was not within the contemplation of either the plaintiff or the defendant that he had any right to move the car. Under the circumstances, what should he as a reasonable person have done? If he undertook to tear down the wall with the steel cable in contact with the top of the car, two difficulties would have been present. The side of the car might have been cut, or the strands of the cable might have been severed, or perhaps both of these things would have occurred. It is common knowledge that if a seven-eighths inch steel cable is broken when under the pressure required to tear down the side of a brick and steel building, the whipping of the loose ends constitutes a serious danger to life and limb. Furthermore, had this occurred, it is entirely possible that the wall would not have fallen and the scrap iron and steel from within it not have been made available for transportation upon the defendant's car. Thus, when the plaintiff went upon the car, he went in furtherance of a task, the accomplishment of which was requisite to use the car for purposes of loading. In these circumstances, we maintain that his act in going upon the car was in the course of the business of his employer, which business was well known to the defendant at the time of the delivery of the car and, further, that it was directly connected with the primary purpose for which the car was delivered, namely, the loading of it.

We submit that the case of *Murphy* v. *Core Joint Concrete Pipe Co.*, 110 N. J. L. 83, 164 Atl. 262, is analogous to the present case. The defendant occupied premises whereon it manufactured concrete pipe. The decedent was employed as a truck driver by a firm which had a contract with the defendant to cart pipe from its premises to such destinations as should be designated by the latter. The defendant maintained on its premises certain pits which were excavated to such a depth that normally the platforms of the truck onto which the pipes were loaded were on a level with the surrounding ground. On the day of the accident, the decedent, in accordance with the usual custom, backed his truck into one of the pits for the purpose of having sections of pipe loaded thereon. It was the duty of the defendant's employees to load the pipes, and the decedent had no part therein except to chock the pipes after they had been loaded. Rain had washed down the rear end of the pit considerably with the result that the bank sloped. In consequence of this, the rear platform of the truck could not completely reach the portion of the ground from which the pipes were to be rolled onto the truck, there being a space of a foot and a half between the truck and the level ground. In order to roll the pipes on the trucks the defendant's employees placed some planks between the platform of the truck and the ground. While rolling the pipes on the truck one of the planks broke with the result that the pipe skidded over to one side at an angle, with one end of the pipe resting on the side of the bank and the side of the pipe in contact with the truck. Thereupon the defendant's superintendent directed the decedent to pull his truck ahead in order that the defendant's employees could get down in the pit and with the aid of a supporting plank lift the pipe to the level ground. The decedent pulled his truck forward and then went to the rear of the truck and down into the pit to see if the truck was clear. While stand-

ing there, the plank which was supporting the pipe as the employees pushed it up on the side of the pit broke, with the result that it slid back into the pit and struck the decedent.

It was argued by the defendant that when the decedent left his truck and came back to the pit, he ceased to be an invitee upon the premises and became a licensee. The court, after reciting the familiar rules that the owner or occupier of lands who by invitation, express or implied, induces persons to come upon the premises is under a duty to exercise ordinary care to render the premises reasonably safe for purposes embraced in the invitation and that where the occupier of lands engages an independent contractor to do work upon his premises, an employee of the contractor while executing the work is there presumably by the request of the occupier and is an invitee, went on to say:

> "Applying these principles, there can be no doubt that at the time the decedent entered with his employer's truck upon the premises of the defendant for the purpose of carrying out the contract between his employer and the defendant, he was by implication an invitee upon such premises. There can likewise be no doubt that at the time he backed the truck into the pit for the purpose of having the pipe loaded thereon, he was upon the defendant's premises by virtue of an implied invitation. There can likewise be no doubt that, at the time he moved the truck forward in pursuance of the request of the defendant's superintendent, he was still an invitee upon the defendant's premises by implication.
>
> "The defendant contends, however, that after pulling the truck forward his status was changed from that of an invitee to that of a mere licensee. This contention apparently is based upon the assumption that the decedent had no right to go into the pit by the rear of his truck where he was injured. But such theory is ill-founded in point of fact. It entirely ignores the fact that it was open to the jury to find that he went to

the place where he received his injury for the purpose of ascertaining if he had cleared the pipe when he pulled his truck forward, as defendant's superintendent ordered him to do, and to be ready to nail in the 'chock' immediately when the pipe was put on the truck, as it was his duty to do.

"When, as here, it was open to the jury to infer from the evidence that, at the time of the accident, the decedent, in going forward in the pit, was naturally led to believe by the defendant's instructions, acts, and conduct that the defendant intended that he should do what he did and as he did, in carrying out the work which his employer had contracted to do for the defendant, the question whether he was an invitee was for the jury, and not for the trial judge."

If the strict rule which the defendant in our case urges had been applied in the cited case, the court could not have found that when the decedent entered the pit it was reasonably inferable that he was impliedly invited to do so. Strictly speaking, the only purpose for which he could leave his truck was to chock the pipe, and obviously, the mishap which had occurred prevented his chocking the pipe at the time he left his truck. Furthermore, if the strict rule urged by the defendant was applied, it could not be said that he had any right in the pit since ordinarily he chocked the pipes from the level ground, the pit being covered by the truck. However, the court did not take this narrow view of the scope of the decedent's invitation. It held that a factual question was presented as to whether or not the defendant extended an implied invitation to the decedent to enter the pit in furtherance of his duties to his employer. This case, we respectfully urge, substantiates our contention that the plaintiff in our case was impliedly invited by the defendant to be upon its car in furtherance of any work of his employer which was directly or indirectly connected with the use for which the car was delivered.

The decision in the case of *Weatherford, M. W. & N. W. Ry. Co.* v. *Duncan, et al.*, 32 S. W. 878 (Supreme Court of Texas) while of a foreign jurisdiction, is precisely in point with the present case. There, the defendant railroad company provided cars to a coal mining company for the purpose of transporting coal. The plaintiff decedent was an employee of the coal company, whose duties were to trim the slate from the coal, place the cars delivered by the railroad company to his employer on the scales and when they were loaded, to remove them therefrom and replace them by other cars to be likewise loaded. On the day of the accident, a box car was standing upon the scales and was partially loaded with coal. A short distance away from this car and upon the same track stood an empty car which had been left by the railroad company for the purpose of being loaded. Near this car, and on the same track, stood a flat car which had already been loaded with slate. While the cars were standing in this relative position the employees of the railroad, by a flying or drop switch, put three or four empty coal cars upon the track upon which the aforementioned cars were located. In doing so, the cars were sent at too great a speed and appeared to be headed for a collision with the car loaded with slate. The decedent, observing this, boarded the empty car (that is, the one between the slate car and the one which he was loading with coal). He was not called upon by the employees of the railroad to do this, but undertook it for the purpose of setting the brake upon the empty car and preventing a collision between it and the car which he was loading. The moving cars struck the car loaded with slate and drove it against the car in which the decedent was, as a result of which the decedent was thrown to the tracks and killed.

The defendant railroad company urged that the decedent was not rightfully upon the box car at the time he was killed, that is to say, his invitation to load the car and weigh

the cargo did not extend to his boarding a car at a time when it was not being loaded. In passing upon this question, the court said (R. 880):

> "From the facts found by the Court of Civil Appeals it appears that the car upon the scales, which was partially loaded with coal, as well as the empty box car upon the track upon which Duncan (decedent) was when injured, were under his control and protection as the employee of the Texas Coal & Fuel Co. He was charged with the duty, on behalf of his employer, to maintain the one in its position, and protect it, while being loaded, and until it was removed from the scales; and the other was under his control, to be by him placed in position for loading when it became necessary to do so. Duncan had the right to enter either car or to get upon the same *for any purpose connected with his employment;* and when a state of circumstances existed which threatened damage to the property in his charge, it became his duty, if necessary to do so, to get upon the empty box car, either to secure that in its place, or to prevent an interference with or injury to the car which was upon the scales."

The court further stated that the decedent stood in the same relation to the railroad company as *any other person would have who was rightfully upon the railroad tracks.*

In *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Cozatl*, 79 N. E. 534 (Court of Appeals, Indiana), the plaintiff's employer entered a contract with the railroad company to repair a brick wall upon its premises. The plaintiff was employed by this independent contractor as a superintendent of the work. In the course of the work the plaintiff found it necessary to use a jack. His employer had not provided one and he decided to borrow one from the railroad company. Having obtained the jack from a part of the railroad company's premises which were not a subject of the repair contract between his employer and the railroad company, he returned to the place of the operation. Adjacent to this

place was a railroad track at the end of which was a bumping post. Bracing himself against the bumping post, he attempted to throw the jack across the track which lay between him and the building which was being repaired. At that instant, cars which were upon the track were moved by the employees of the railroad company and the car nearest the bumping post ran against it causing injury to the plaintiff. It was contended by the defendant that the invitation to the employees of the independent contractor did not give them the right to go upon the railroad track nor to stand in the position against the bumper in which the plaintiff was standing at the time of his injury and that, consequently, he was a mere licensee at such time. Furthermore, it was urged that since there was no agreement between the railroad company and either the plaintiff or his employer that the railroad company would furnish tools and appliances for doing the work, there was no invitation extended to the plaintiff to cross the tracks for the purpose of borrowing the jack. The court said (R. 538):

> "Upon the facts stated, we feel fully justified in holding that the appellee was not a trespasser. While working for an independent contractor he was doing work for the benefit of the appellant. He was on appellant's premises, where he had a right to be to do the work in which he was engaged. *We cannot adopt so narrow a view as to say that he was a trespasser unless he was in the exact spot or location where the actual work was being done.* His employment was not circumscribed within such narrow limits. In going to get the jack to aid in the prosecution of his work, he was in a place where he had a right to be, under the invitation of appellant."

In the case of *Rio Grande, E. P. & S. F. Ry. Co. et al.*, v. *Guzman*, 221 S. W. 1102 (Court of Civil Appeals of Texas), it appeared that the plaintiff, an employee of a consignee of the railroad company, was killed while attempting to

cross a railroad track, when a car upon it was shunted against him by other cars operated by the railroad company employees. The circumstances under which this happened were these: The car to be unloaded was, through the negligence of the defendant's servants, spotted a short distance from a loading platform rather than flush with the platform. The crew of the consignee were obliged to move the car to the platform before the unloading could be commenced. In order to do this, it was necessary to release the car in question from a string of cars to which it was attached. After the car had been so detached and moved for a distance of four feet, the decedent crossed the track through the opening. At this moment, the string of cars was struck and the decedent was crushed. It was contended by the defendant that the decedent was its invitee solely for the purpose of unloading the car. Such operation would ordinarily have been done from the loading platform and there would have been no occasion for his being upon the track. Consequently, it was contended that when he went upon the track, he exceeded the bounds of his invitation and became a licensee. The court said:

> "The circumstances under which the deceased was killed have been detailed, and it appears that at the time he was rightfully upon the premises and acting *in the furtherance of his master's interests.* The switching crew had failed to properly place the flat car, and in assisting in so doing deceased was doing what was absolutely necessary under the circumstances, and what appellant reasonably might have anticipated would be done.
>
> "He was not a volunteer, trespasser, nor mere licensee, but, on the contrary, a person to whom this appellant at the time owed the duty of ordinary care."

We respectfully submit that the facts in the present case sustain the view of the trial court that a factual question

was presented of whether or not the plaintiff at the time of the accident was impliedly invited by the defendant to go upon the railroad car in furtherance of his master's business.

c) *Plaintiff's Employer's Duty as a Bailee to Use Care to See that the Car Was Not Damaged, Made Plaintiff an Invitee by Implication when upon the Car for the Purpose of Preventing Damage to it.*

The relationship between the railroad company and the Merberg company as to the car was essentially that of bailor and bailee. It is fundamental that in a bailment for the mutual interest of the parties the bailee is under a duty to exercise reasonable care to preserve the object of the bailment in the condition in which it was when delivered, reasonable wear and tear excepted. At the time of this accident, the plaintiff was upon the railroad car not only in furtherance of his employer's business, but also for the purpose of preventing damage to the car which might have resulted from the steel cable coming in contact with the side of the car when pressure was applied to the cable. He was, therefore, discharging a duty owed by his employer to the railroad company. Since this duty by implication of law is presumed to be within the contemplation of the parties to the bailment, it follows that it must be within the contemplation of the said parties that employees of the bailee who are undertaking to discharge the duty are deemed to be invited upon the object of the bailment to effect this purpose. This is clearly set forth in *Weatherford, M. W. & N. W. Ry. Co.* v. *Duncan, et al., supra,* in the portion of the opinion quoted under "b)".

We, therefore, respectfully contend that upon this theory the plaintiff herein was rightfully upon the railroad car.

On the basis of all three reasons argued above, (a), (b)

and (c), it is respectfully urged that the plaintiff was an invitee on defendant's freight car at the time of his injury as a matter of law, or that, in its most unfavorable aspect to the plaintiff, the problem of invitation was one for determination by the jury. Consequently, the Circuit Court erred in holding otherwise and in reversing plaintiff's judgment.

POINT TWO.

The evidence adduced at the trial created a question of fact for determination by the jury as to the negligence of the defendant. The proof tended to show that the defendant failed to apply the brake and to chock the freight car as was required by the admitted custom and practice.

The question of whether or not the trial court was justified in submitting the issue of the defendant's negligence to the jury for determination while raised in the Circuit Court, was not passed upon there. The court limited itself to the invitation problem and having decided that problem adversely to the plaintiff, said that it was not necessary to consider the other grounds of appeal. With the thought that this Court may wish all of the phases of the case discussed, we are setting out under this point as briefly as possible our argument below as to the defendant's negligence.

It was contended below by the appellant upon this point, that the uncontradicted testimony of the employees who delivered the car, at the time of delivery the brake was applied and a chock placed under the wheels conclusively established this to be the fact. The cases upon this subject fail to substantiate this argument. In the case of *Smith* v. *New York, Susquehanna & Western R. R. Co.,* 46 N. J. L. 7, it appeared that the defendant left a loaded car coupled with two empty cars standing on a switch which inclined toward the main track, the same being secured by brakes and a rail-

road tie placed under the wheels of the loaded car. In some manner not accounted for by the evidence, the cars came upon the main track and thereby an accident occurred in which the plaintiff was injured. The defendant requested the court to charge that if the jury were satisfied that the loaded car had been made fast by means of a bar and brakes, at a safe distance from the main track, and was incapable of motion toward it without the removal of the bar and brake, and without the application of external force, the defendant was not guilty of negligence. A further request was made that the court charge that if the jury were satisfied that the car was braked and the collision was caused by loosening of the brake by an unlawful act of a stranger, the defendant was not guilty of negligence. In reviewing the propriety of the judicial action in denying these requests, the court, through Chief Justice Beasley, said:

> "Each of them, if adopted, committed the court to the doctrine that the action could not be supported if the cars in question were so securely fastened that but for the intervention of extraneous force they would not have got upon the main track, or if that, they would not have done so without the unlawful action of human agency. There is no legal measure by which it can be predicated as a matter of law, that if a loaded car can be placed on a switch which has an inclination towards the main track, such car being so secured by its brake and a railroad tie under its wheels that it cannot change its position without the removal of such safeguards, such car is to be considered as secured with that degree of care, and skill and prudence which the law requires to be exercised in such matters. Such a question is essentially one for the decision of the jury. The judge could not properly be called upon to pass any opinion as to the sufficiency of the means that had been employed, nor that such means were legal if they would have held the cars in position without the application of 'external force.'

"* * * If a person without right were upon the property of the company, and while there, from carelessness in passing, had trod upon and dislodged the railroad tie placed to keep the car in its position, and had thus been the cause of the accident, it is clear, in the words of the request, the 'loosening of the car,' would have been 'by the unlawful act of a stranger,' and yet, I think it would not necessarily follow that the company would have been irresponsible for the consequences. I am not aware of any legal principle that would justify a railroad company in leaving loaded cars in such a situation that they could be caused to run on to its main track in the way of its passing trains, by the carelessness of persons passing by or by the act of children playing near their switches."

In the case of *Hendershot* v. *New York, Susquehanna & Western R. R. Co.* (N. J. not reported in official reports), 138 Atl. 206, the plaintiff, while riding in an engine, was in collision with two freight cars which came down a steep grade unmanned. There was evidence that the hand brakes upon one of the cars had been set and the cars coupled together. There was also evidence that wooden blocks were placed under the wheels of the cars. The court said that from the fact that the brake did not hold the cars, it could be inferred that the brake was not in an efficient and proper condition, and from the fact that the wooden blocks did not prevent the cars from moving, it could be inferred that the blocks had been placed under the wheels in a negligent manner.

The reasoning of these decisions is the same in principle as that in the cases of "runaway" automobiles. In *Spanko et al.* v. *Spitalnick*, 101 N. J. L. 5, 127 Atl. 663, the facts were that the defendant stopped his automobile on a down grade and at the curb. He left it unattended and while he was gone, it started down the street, mounted a curb and struck the plaintiff, who was standing on the sidewalk. The

defendant testified that before leaving the car he had applied his brake and turned the front wheel against the curbing. The court held that it was open to the jury as reasonable men "to discredit the defendant's testimony in whole or in part as to cautionary measures and to find that the machine started because of his failure to take reasonable care in securing or safeguarding it when he left it standing on the down grade."

In *Sheridan* v. *Arrow Sanitary Laundry Co. et al.*, 105 N. J. L. 608, 146 Atl. 191, the evidence was similar to that adduced in the *Spanko* case *supra*. A car had been parked upon a down grade and in some unexplained manner started up and after running some distance collided with the plaintiff, injuring him. The driver of the automobile testified that he had applied the brakes and had stopped the car with the right front wheel resting against the curb. He also said that he had tried the brake after the accident and it was "O. K." He further said that following the happening the brake bands had been tested and found to be in sound condition. Justice Case, speaking for the New Jersey Court of Errors and Appeals, said:

> "The unexplained presence upon the public highway of this 'runaway' motor truck, without driver or occupant, moving along the highway to the far side thereof, mounting the curb and doing serious physical injury to a person lawfully there, raises a prima facie presumption of negligence upon the part of the owner and on the part of the owner's employee in whose charge the car was.
>
> "We think that there was evidence sufficient to raise a jury question as to whether defendant's driver had exercised such care as a person of ordinary prudence would exercise in the circumstances. Did he adequately brake the car? There was evidence susceptible of the version that the car when it arrived at the scene of the accident was not braked. * * *."

In this case, as in the *Spanko* case, the refusal of the court to direct in favor of the defendant was affirmed.

In the present case, there is evidence that immediately after Hanson was injured the brakes on this car were found to have been released, and there is also evidence that no chocks were beneath the wheels of the car. The defendant, in answer to this testimony, offers the testimony of the crew which placed the car upon the track. Arthur Dolce, who was in charge of this crew, testified that he had applied the hand brake and that chocks were placed under the front wheels of the car by the witness, George Naughton (R. 334, 11. 12-20). This was done on September 22 and it was not until September 24 that he learned of the happening of the accident. In the course of cross-examination the importance of an efficient chock and of the proper placing of such chock under the wheels became apparent. He testified that a chock is placed under the wheels to secure the car and that this is always done when a car is placed upon a "public street or highway" (R. 335, 11. 17-25). On redirect examination he indicated that when cars are placed upon public highways it is necessary to be very careful in the placing of the chocks (R. 338, 1. 20). George Naughton, who assisted in placing the car, and who is said to have placed the chock under the wheel, was interrogated at some length concerning the type of chock used (R. 334, 345, 346, 347). Having in mind the emphasis placed by the railroad employees upon the necessity for placing the chock on cars spotted upon a public highway, his description of the chock was very interesting. It appears from his testimony that the railroad company did not provide the employees with wood to be used for chocking purposes, but that the employees used any piece of scrap wood they were able to find in the vicinity of the car. These scraps could be of any kind of wood and of any thickness, providing they were at least one-half inch thick (R. 346, 1. 5), and he

said that if a chock one-half inch thick had been placed under the wheel, this car, weighing twenty-one tons, would have been held in place on this grade even if the brakes had been released (R. 345, l. 23; R. 346, l. 23).

James Dever, the engineer who towed the car to the track, substantiated the testimony of the other two witnesses on direct examination. On cross-examination, however, he admitted that the reason why he testified that the car was braked properly and chocked properly was that it was the practice to brake and chock cars (R. 352). It was inferable, therefore, that he was testifying as to a general practice rather than from his recollection of what was done in this case.

The testimony of these witnesses could have led the jury to conclude that the brakes were in good condition and were properly applied; likewise, that the chocks used were fit for the purposes for which they were used, and so placed that the defendant had fully discharged its duty to those who were lawfully on and about the car. However, the jury was not bound to come to this conclusion and was at liberty to find from the happening of the accident itself, or from the description of the method employed by the defendant's servants in securing the car that the defendant was negligent. Furthermore, from this testimony it could be concluded that all of these witnesses were testifying as to the proper practice to be employed and not from a definite recollection of what was done by them. In the latter event, the jury could infer that the testimony amounted to nothing more than a statement of the standard of care and offered nothing in support of a contention that the standard had been complied with.

It is, therefore, respectfully urged that the trial court was correct in holding that there was ample evidence in the case from which the defendant's negligence might be inferred.

It is respectfully submitted on the whole case that the Circuit Court of Appeals erred in reversing plaintiff's judgment and that a Writ of Certiorari should be allowed to review the reversal.

JAMES RAYMOND BERRY,
Counsel for Petitioner.

(5055)